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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROBERT M. WOHLFARTH,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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13 pp

TABLE OF AUTHORITIES

CASES

Carpenter v. United States, 484 U.S. 19 (1987) 5

Klitzman, Klitzman and Gallagher v. Krut, 744 F.2d 955 (3d Cir. 1984) 8

Morissette v. United States, 342 U.S. 246 (1952) 4

United States v. Fowler, 932 F.2d 306 (4th Cir. 1991) 5

United States v. McAusland, 979 F.2d 970 (4th Cir. 1992), *cert. denied*, ___ U.S. ___ 1993) 5

United States v. Zolin, 491 U.S. 554 (1989) 8

STATUTES

18 U.S.C. § 641 ..... 2, 3, 4, 5

18 U.S.C. § 2517(4) 7

18 U.S.C. § 2518(4) 6, 7

MISCELLANEOUS

8 J. WIGMORE, EVIDENCE § 2292 7

8 J. WIGMORE, EVIDENCE § 2336 . . . . . 7, 9

M. Goldsmith & K. Balmforth, *The Electronic Surveillance of Privileged Communications: A Conflict of Docrtines*, 64 S. CAL. L. REV. 903 (1991) 8

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REPLY BRIEF FOR PETITIONER

The government does not justify the decision below, but runs from it, ultimately missing the important doctrinal issues present here. In its cursory opposition, the government simply has not offered any reason sufficient to rebut Petitioner's claim that the issues posed fully merit this Court's review. The petition therefore should be granted.

THE THEFT OF GOVERNMENT PROPERTY ISSUE MERITS REVIEW

1. The government's opposition misstates the holding of the court below. The court below held that Section 641 did not obligate the government to identify the information Petitioner allegedly disclosed; that the government need only have proved that the information related to the 10-PIGA procurement; that all the information relating to the procurement was by operation of law a "thing of value"; and that Petitioner had to obtain the permission of an executive branch official before disclosing any information relating to the procurement.

The government instead improperly attempts to limit the holding below. The government argues that the court held merely that information relating to bid prices could be a thing of value, that Petitioner disclosed bid prices, and that the jury therefore was entitled to find Petitioner guilty of violating Section 641.

The government's opposition misses the point. Neither the indictment nor the jury instructions identified the information allegedly disclosed. Both instead advised the jury that *any* information relating to the 10-PIGA procurement was *by operation of law* a "thing of value." (App. 13-14). It thus is impossible for this Court to determine what information the jury convicted Petitioner of disclosing.

By ignoring the holding of the Court below, the government attempts to will away the important issue this petition presents. If Section 641 is to apply to information that merely relates to a government procurement, a jury would be entitled to convict a defendant of disclosing information in which the government holds no property interest. By adopting this rule, the Fourth Circuit placed itself squarely in conflict with the Second, Fifth, Seventh, and Ninth Circuits, all of which have held that only the property of the United States may constitute a "thing of value" for purposes of Section 641. (*See* Pet. 16-19). This Court should resolve this important conflict in the circuits.

The government's opposition also ignores other issues posed by the decision below. For example, the government does not respond to and apparently does not contest that that the decision below conflicts with the statute's common law underpinnings. (*See* Pet. at 14-15, 19 n.3). As a codification of the common law, Section 641 cannot extend beyond the common law definitional boundaries present at the time Section 641 was enacted. Plainly, at that time Section 641 did not address the conversion of information. The government's attempt to apply Section 641 to alleged wrongdoing not covered by the language of the statute should be rejected.[1] The government also

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[1] The government erroneously refers to the allegedly broad purpose and reach of Section 641. (Govt. Opp. 5, 6, 7). For example, the government states that Section 641 was intended to "provide comprehensive protection to the government's property

has no response to Petitioner's argument that the numerous statutes specifically governing the disclosure of government-held information evidence Congress' intent and understanding that, consistent with the common law, Section 641 does not apply to information and other intangibles. (*See* Pet. 15-16). Finally, the government ignores Petitioner's argument that the decision below throws Section 641 into conflict with the Whistle Blower Protection Act. (*See* Pet. 19-20).

Petitioner argued that the decision below conflicts with the Ninth Circuit's holding that information and other intangibles cannot be a "thing of value" for purposes of Section 641. (*See* Pet. 13-16). Even though the Ninth Circuit has three times held that intangibles are not "things of value" for purposes of Section 641, the government argues that "[t]he cases cited by petitioner . . . did not require the Ninth Circuit squarely to consider whether Section 641 covers the conversion of government information." (Govt. Opp. 8). The government's response is unavailing. Information has always been classified as an intangible. *See, e.g., Carpenter v. United States*, 484 U.S. 19, 25 (1987)(confidential business information is an intangible). This Court need not wait for the Ninth Circuit to express the obvious -- that information is an intangible. The

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rights." (*Id.* at 5). The government offers no support for its sweeping assertion, and Petitioner knows of none. *See Morissette v. United States*, 342 U.S. 246, 266-67 (1952)(Section 641 merely codified the common law property crimes then in existence).

decision below poses a clear conflict in the circuits, and the government has offered no reason to conclude otherwise.[2]

Finally, the government asserts that this case is of no continuing importance because Congress has enacted the Procurement Integrity Act. (Govt. Opp. 9-10). The government is wrong. This case presents an issue of paramount importance -- the extent to which the government can criminalize the disclosure of government-held, intangible information that merely relates to a governmental interest. The decision below represents a dangerous extension of a statute which already has become the prosecutor's statute of choice. This issue transcends the government-contract context generally or the Procurement Integrity Act specifically, and fully merits this Court's review.

THE COURT'S ELECTRONIC SURVEILLANCE RULING ALSO DESERVES REVIEW

2. The government's opposition also establishes that this Court must resolve the doctrinal

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[2] The government argues that Petitioner waived this argument because he did not raise it in the court of appeals. The government is wrong. Petitioner argued in the court below that Section 641 did not apply to this case. (*See* Pet. C.A. Br. 16-28). Moreover, Petitioner was effectively precluded from arguing in the court of appeals specifically that information is not a "thing of value" because the court twice recently had held that information could constitute a "thing of value." *See United States v. McAusland*, 979 F.2d 970 (4th Cir. 1992), *cert. denied*, ___ U.S. ___ (1993); *United States v. Fowler*, 932 F.2d 306 (4th Cir. 1991).

conflicts relating to the electronic surveillance of privileged communications. Consistent with the fourth amendment, the electronic surveillance statute requires that a surveillance warrant identify the person, location, and type of communications that the government will intercept. 18 U.S.C. §§ 2518(4)(a)-(c).[3] The statute prohibits the government from abrogating the particular privileges: "[n]o otherwise privileged wire, oral, or electronic communications intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." 18 U.S.C. § 2517(4). The statute also requires that law enforcement officials conduct the surveillance "in such a way as to minimize the interception of communications not otherwise subject to interception." 18 U.S.C. § 2518(4).

The government argues that the minimization requirement permits it to do what the statute says it cannot -- abrogate the privilege. The

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3 Section 2518 provides in pertinent part:

Each order authorizing or approving the interception of any wire, or oral, or electronic comunication . . . shall specify --

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates.

government argues that the statute entitles it to "continue to listen to conversations that do not implicate the privilege or that involve criminal activity." (*Id.* at 10). Under the government's interpretation, a conversation would not "implicate the privilege" if the surveillance of the otherwise privileged conversation revealed evidence of criminal activity, even if, as here, the conversants are not identified in the warrant and even if there is no extrinsic evidence supporting a good faith belief that the conversants are together involved in criminal activity. (*Id.* at 10).[4]

Under this interpretation, the fourth amendment provides almost no protection to privileged oral conversations that are subject to an electronic search and seizure and certainly far less protection than is afforded to privileged documents. *See* M. Goldsmith & K. Balmforth, *The Electronic Surveillance of Privileged Communications: A Conflict of Doctrines*, 64 S. CAL. L. REV. 903 (1991). The government could not, for example, conduct an indiscriminate search of documents contained in an attorney's office, reading each document, stopping only when the search of the privileged document

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4 As stated *infra*, the government misstates the scope of the marital privilege. The government is entitled to determine whether particular conversations "implicate the privilege" in the attorney client context, where the privilege protects only those communications whose purpose is to seek or obtain legal advice. 8 J. WIGMORE, EVIDENCE § 2292 (McNaughton rev. ed. 1961). But the government cannot make that same determination in the marital privilege context because the marital privilege protects all private marital communications. *Id.* at § 2336.

revealed no evidence of criminal activity. *See Klitzman, Klitzman and Gallagher v. Krut*, 744 F.2d 955 (3d Cir. 1984)(warrant was overbroad that allowed the search and seizure of all of a law "firm's financial records, file lists, and appointment books, regardless of whether those documents were connected in any way to the . . . files sought by the grand jury"). Yet the government asserts that the surveillance statute permits it to seize oral communications in precisely that fashion.

If the government is correct, it possesses the power to disregard the privilege. If the government's electronic surveillance unearths evidence of criminal activity, the government argues that it is entitled to use that evidence at trial, regardless of whether the evidence was privileged at the time the government made the decision to monitor the conversation. This position simply cannot be correct, for it gives to prosecutors a power that this Court has denied to impartial federal judges. *See United States v. Zolin*, 491 U.S. 554 (1989)(district court may not conduct an *in camera* inspection of privileged materials to determine applicability of crime/fraud exception absent extrinsic evidence supporting good faith belief by a reasonable person that inspection may reveal evidence of criminal activity).

The government's opposition fails completely to address these doctrinal problems. The government instead offers a series of arguments that rest on inaccurate legal and factual premises. First, the government claims that "petitioner did not contend that any conversation played at trial

involved privileged communications." (Govt. Opp. 4). The government simply misstates the scope of the marital privilege. Petitioner claimed in the district court (App. 20-21) and in the court below (Pet. C.A. Rep. Br. 23) that the marital conversations intercepted by the government were privileged and should have been suppressed. The marital privilege applied to all of the monitored conversations between the Wohlfarths, for the privilege applies to any private, marital communication. 8 J. WIGMORE, EVIDENCE § 2336 (McNaughton rev. ed. 1961). Petitioner's objection that the conversations were privileged did not apply only to a few, but to all of the surveilled conversations between Petitioner and his wife. Moreover, as stated in the petition (*see* Pet. 25-26), Petitioner did object at trial to the introduction of the marital communications on the grounds of privilege, and the government acknowledged at trial that this issue had been preserved. (App. 20-21).

Second, the government wrongly argues that it "had a good faith basis for intercepting the conversations between petitioner and his wife." (Govt. Opp. 11). The first wiretap order in the district court was signed on January 16, 1987. (Pet. C.A. Br. 40). The named interceptees were Parkin and others. Neither Petitioner nor his wife were listed as a named interceptee, nor was there any showing in the government's supporting affidavit of any probable cause to believe that the Wohlfarths may have engaged in criminal activities. (*Id.*). Government agents nevertheless intercepted five privileged marital communications before the agents even mentioned the Wohlfarths in their supporting

affidavit on February 13, 1987. (C.A. App. 287). Only after reviewing these and subsequent privileged conversations did the government assert probable cause to believe that the Wohlfarths were together involved in criminal activity.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[5] In its February 13, 1987 extension order, the district court only found "some cause," not probably cause, to believe that the Wohlfarths were engaged in criminal activity. The government did not allege probable cause to believe the Wohlfarths were engaged in criminal activity until June 3, 1987. (Pet. C.A. Br. 41). Yet by that time the government had for five months listened to scores of conversations between the Wohlfarths. (*Id.*; C.A. App. 336). Only after the government had listened to these marital communications did it allege probable cause to believe the Wohlfarths were engaged in criminal activity. And it wrongly made that determination on the basis of the wrongly intercepted conversations, not on the basis of extrinsic evidence. *See Zolin*, 491 U.S. at 572.